In the Supreme Court of the United States

October Term, 1973
No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,

Intervening Parties Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES PITTENGER AND SLOAN

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Constitutional and Statutory Provisions Involved	3
Questions Presented	4
Statement of the Case	5
Summary of Argument	7
Argument:	
I. Introduction	9
II. Acts 194 and 195 serve a secular legislative purpose	11
III. The auxiliary services program (Act 194) meets the primary effect and excessive entanglement tests of the Establishment Clause	12
A. The auxiliary service program	12
B. Primary effect	14
C. Excessive entanglement	18
IV. The textbook loan program meets the primary effect and excessive entanglement tests of the Establishment Clause	22
A. The textbook loan program	23
B. Primary effect	24
C. Excessive entanglement	26
V. The instructional materials program meets the primary effect and excessive entanglement tests of the Establishment Clause	27

A. The instructional materials program .. 27
B. Primary effect 29
C. Excessive entanglement 30
VI. The instructional equipment program meets the primary effect and excessive entanglement tests under the Establishment Clause 32
A. Primary effect 32
B. Excessive entanglement 33
VII. Acts 194 and 195 do not generate the possibility of political divisiveness along religious lines 34
VIII. Appellants have failed to prove that Acts 194 and 195 violate the Establishment Clause 35
Conclusion 38

TABLE OF CITATIONS

CASES:

Board of Education v. Allen, 392 U.S. 236 (1968) 10, 11, 12, 14, 18, 20, 22, 23, 24, 25, 26, 29, 30, 35
Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) 11
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) .. 9, 10, 14, 16, 23, 32, 33, 34, 37
Edelman v. Jordan, 94 S. Ct. 1347 (1974) 10
Everson v. Board of Education, 330 U.S. 1 (1946) 11, 12

Hunt v. McNair, 413 U.S. 734 (1973) ..14, 15, 18, 23, 30, 35, 37
Lemon v Kurtzman, 403 U.S. 602 (1971) .. 9, 18, 20, 21, 23, 26, 31
Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973) ..14, 15, 23, 33
Norwood v. Harrison, 413 U.S. 455 (1973) 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 11
Public Funds for Public Schools of New Jersey v. Marburger, 94 S. Ct. 3163 (1974) 10, 11
Sloan v. Lemon, 413 U.S. 825 (1973) 14, 16
Tilton v. Richardson, 403 U.S. 672 (1971) ..14, 18, 23, 30, 33, 37
Walz v. Tax Commission, 397 U.S. 664 (1970) .. 23
Wheeler v. Barrera, 94 S. Ct. 2274 (1974) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, First Amendment 3, 7
Pa. Stat. Ann. tit. 24, §1-108 21
Pa. Stat. Ann. tit. 24, §8-801 25
Pa. Stat. Ann. tit. 24, §§9-951 to 9-971 (Supp. 1974) 13
Pa. Stat. Ann. tit. 24, §9-972 (Supp. 1974) 3, 5

Case Caption

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OPINION BELOW

The Opinion of the District Court is reported at 374 F. Supp. 639 (E.D. Pa. three judge Court 1974). Copies of the Majority and Dissenting Opinions are set forth in the appendix to the Jurisdictional Statement (hereinafter referred to as J S).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

Acts 194 and 195 are set forth in the appendix to Jurisdictional Statement and page references thereto will be preceded by the letters J S. These statutory provisions are reported at Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

QUESTIONS PRESENTED

I. Does Act 194, which provides certain defined "auxiliary services" on an individualized basis in nonpublic schools to specific children found to be in need of such services which are beyond those available in a general instructional program, which Act complements other State statutes providing like services to students in public schools, violate the Establishment Clause of the First Amendment to the United States Constitution?

II. Does Act 195 which authorizes the loan of textbooks, instructional materials and instructional equipment (not readily divertible to religious purposes) for the benefit of children enrolled in nonpublic schools, which Act complements other State statutes which provide identical educational aids for the benefit of children in public schools violate the Establishment Clause of the First Amendment?

III. Have appellants met their burden of proving that Acts 194 and 195 are unconstitutional under the Establishment Clause?

STATEMENT OF THE CASE

This appeal challenges the constitutionality of two amendments to the Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 et seq., on the ground that these amendments violate the Establishment Clause of the First Amendment. The Public School Code embodies a comprehensive scheme for educating all children of elementary and secondary school age. The specific statutes challenged in this proceeding are Act 194 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (Supp. 1974) (hereinafter, "Act 194") and Act 195 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (hereinafter, "Act 195").

Act 194 (J S at 108a) states that the Commonwealth will provide specific "auxiliary services" on an individual basis, to those nonpublic school children who require services beyond those available as part of a general instructional program. All the "auxiliary services" authorized by Act 194 are presently provided for public school children. Act 195 (J S at 111a) authorizes the loan to nonpublic school children of textbooks which are acceptable for use in public schools. In addition, Act 195 also authorizes the loan of such instructional equipment and materials as are useful to the education of such children and which are "presently or hereafter provided for public school children" (J S at 113a, 114a). The instructional materials and equipment must be secular, neutral and nonideological in nature.

After a full evidentiary hearing, which detailed the manner in which these State programs operate, a three

judge District Court upheld the constitutionality of Act 194. The Court also upheld the constitutionality of Act 195 with the limitation that the only equipment which could be loaned is equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, J S at 102a-103a).

SUMMARY OF ARGUMENT

Acts 194 and 195 are two legislative enactments of the Commonwealth of Pennsylvania designed to assure that "every school child in the Commonwealth of Pennsylvania will equitably share in the benefits of" certain specified auxiliary services, as well as textbooks, instructional equipment and materials. The Acts attempt to harmonize educational benefits to public and nonpublic school children in the four areas which they treat. The services and aids provided are purely for the benefit of the school children of this State. These Acts are challenged here as being violative of the Establishment Clause of the First Amendment.

The Acts themselves and the record established in this case clearly demonstrate that the Acts serve a valid and important secular purpose. The innate restrictions on the use of the educational aids which are provided, their self-policing characteristics, firmly establish that the aid provided to school children has been restricted to the secular aspects of education only. Moreover, their self-policing characteristics demonstrate that excessive entanglement by the State in religious affairs is not present. The auxiliary service program, administered by professional public employees, is secular in nature. Limited forms of auxiliary services, not part of the normal instructional programs of the school, are provided to individual students who are in need of them. Such a program does not involve the State in religion and the nonreligious char-

acter of the services cannot be said to advance religion as that term has thus far been defined by this Court.

Appellants argue here that the Acts are unconstitutional and are susceptible to unconstitutional application. Yet, they singularly failed to offer proof to support their conclusions at the evidentiary hearing in the District Court. Important State legislation should not be invalidated on the basis of conjecture. Appellants have failed to establish the unconstitutionality of the Acts or their application.

ARGUMENT

I. Introduction

The instant appeal calls upon this Court to chart, once again, the troubled currents between "the Scylla and Charybdis of 'effect' and 'entanglement'." *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 788 (1973). Justice Powell's metaphor is most apt for two reasons. First, the metaphor highlights the inner tension which exists between two of the standards which a statute must meet if it is to be found constitutional under the Establishment Clause. Secondly, it emphasizes that a channel does exist between the two. That channel is not clear, and it is certainly not wide; yet it is submitted that as Jason sailed through the Straits of Messina, so too do Acts 194 and 195 pass both the primary effect and entanglement criteria of the Establishment Clause.

This Court has so often and so recently stated the three requirements which must be met by any statute challenged on Establishment Clause grounds that it will suffice to paraphrase them here. First, the statute must have a secular legislative purpose; second, its principal or primary effect must neither advance nor inhibit religion; and third, the statute must not give rise to excessive government entangelment with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971).

In assessing appellants' challenge to these statutes it is important that this Court focus on the specific nature of the four programs countenanced by the two enactments. As this Court said in reserving the Establishment Clause issue raised under the Federal Elementary and Secondary Education Act in *Wheeler v. Barrera*, 94 S. Ct. 2274, 2287-88 (1974), "the First Amendment implications may vary according to the precise contours of the plan that is formulated," and this requires "a careful evaluation of the facts of the particular case."[1] Those facts and the contours of these four state programs have been well defined in the record of this case.

[1] This Court summarily affirmed the judgment of the United States District Court for the District of New Jersey in *Public Funds for Public Schools of New Jersey v. Marburger*, 94 S. Ct. 3163 (1974). The New Jersey programs invalidated in *Marburger* are readily distinguishable from the Pennsylvania programs challenged in this proceeding. The reimbursement features of the New Jersey Act are, of course, akin to the New York reimbursement proposal invalidated in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) whereas Acts 194 and 195, when read *in pari materia* with other provisions of the Public School Code, are remarkably akin to the uniform textbook loan program found constitutional in *Board of Education v. Allen*, 392 U.S. 236 (1968). As to the relative weight to be given to this Court's summary affirmances, see generally *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974).

The limited precedential value of *Marburger* is underscored by the fact that the majority opinion of the District Court in the instant case, well aware of the lower court's decision, makes no reference to it in its opinion, and the dissent refers to it only twice and in passing (Dissenting Opinion, J S at 64a, 68a).

The precedential value of *Marburger* is further dissipated by this Court's reservation of the Establishment Clause issue in *Wheeler v. Barrera*, a decision rendered one week before the summary affirmance in *Marburger*, and a case dealing with a federal aid to education program similar in many respects to the Pennsylvania statutes challenged in this appeal.

II. Acts 194 and 195 Serve a Secular Legislative Purpose

Although appellants in the District Court did not dispute that the Pennsylvania Legislature had a legitimate secular purpose in enacting the challenged statutes, nevertheless, appellants now argue that the Acts constitute an effort to provide state funds "for the support of religious and private schools"[2] (Brief for Appellants at 4). Even if appellants' statement properly characterized the legislation, "it is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Everson v. Board of Education*, 330 U.S. 1, 7 (1947); *Board of Education v. Allen*, 392 U.S. 236, 247 (1968); *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 375 (1930); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[2] Appellants also charge that the creators of those statutes—the Governor and the General Assembly of the Commonwealth of Pennsylvania—view the Establishment Clause as a "necessary evil", "a foe, to be evaded and outwitted by whatever stratagem may prove effective" (Brief for Appellants, at 10). This is a shockingly unfair statement, stemming from appellants' dogmatic belief in the rightness of their own position. It is an odd form of argument, indeed: All parties agree that the Establishment Clause is the touchstone by which these State education programs are to be tested. Yet, because the State believes that these programs meet that test, because we view the Establishment Clause as allowing the educational assistance countenanced by these Acts, appellants resort to using labels instead of arguments.

The Acts have just such a purpose. The legislative intent is clearly stated in the Acts' findings: To assure that "every school child in the Commonwealth will equitably share in the benefits" of certain specified auxiliary services, textbooks, instructional equipment and materials. (App. at 109a, 113a) This purpose, moreover, is virtually identical to those contained in the Acts upheld by this Court in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968). The District Court had little difficulty in concluding that the Acts served a valid secular purpose. That purpose is manifest and appellants have singularly failed to dispute it in the record in this case.

III. The Auxiliary Services Program (Act 194) Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

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In order to properly determine the constitutionality of Act 194, it is necessary to view the operation of the program itself and thereafter to assess it in the light of the constitutional standards which it must meet.

A. The Auxiliary Service Program

Act 194 defines auxiliary services as:

> ". . . guidance, counseling, and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

The Act authorizes that such services be provided to those children in nonpublic schools who are in need of them. The services are performed by professionals in the various fields of specialization on the facilities of the nonpublic schools. By the terms of the Act, only those auxiliary services which are provided to public school students may be provided to nonpublic school students. Act 194 is administered by the State's Intermediate Units, local administrative agencies which oversee and assist school districts within their respective geographic areas. Pa. Stat. Ann. tit. 24, §§9-951 to 9-971 (Supp. 1974). In providing auxiliary services to nonpublic school students, the Intermediate Units must conform to the School Laws of Pennsylvania, the Regulations of the State Board of Education and the procedures of the Department of Education.

Significantly, the services are performed by employes of the Intermediate Units and not by personnel of the nonpublic schools. The record in this case palpably demonstrates that there is a need for such services by many students in the nonpublic schools. In fact, because such services have not been readily available to nonpublic school students prior to the passage of Act 194, there is presently an even greater need for such services in the nonpublic schools than the public schools, where such services have

long been available (App. at A 65-A 67, A 74-A 75). It is also important to note that the services provided are, of their very nature, provided on an individual basis to particular children who are determined to be in need of them. The nature of the services provided demonstrates that the services are above and beyond what would normally be available as part of a general instructional program. Hence, the program is truly "auxiliary" in nature and not a part of the nonpublic school's general instructional program.

B. Primary Effect

The District Court, in its opinion, reviewed this Court's recent decisions under the primary effect test. The Court noted that this Court had found State educational programs invalid under the primary effect test in *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973), whereas such legislation had been sustained by this Court under the primary effect test in *Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973).

A review of these decisions led the District Court to conclude that State expenditures violate the primary effect test if:

> "1. the payment is made directly to a sectarian school and is not effectively restricted to use by that school for secular nonreligious purposes, or
>
> 2. the payment is made directly to parents as a reimbursement for expenses incurred in sending children to a sectarian school and the payment is not effectively restricted to reimbursement for expenses for identifiable secular nonsectarian pupil activities or needs." (J S at 19a-20a.)

Conversely, the Court noted that such expeditures did not violate the primary effect test:

> "1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or nonreligious, or
>
> "2. if, although a property or service is furnished directly to a student, it is clearly identifiable as a secular or nonreligious property or service, or
>
> 3. if, although a payment or service is furnished directly to a secular institution its use is effectively restricted to the secular nonreligious activities of the institution." (J S at 21a.)

Chief Justice Burger was even more succinct in placing in focus the parameters of the primary effect test: State educational expenditures will violate the primary effect test where "the aid that will be devoted to secular functions is not *identifiable* and *separable* from aid to sectarian activities." *Levitt*, supra, 413 U.S. at 480 (emphasis supplied). This, of course, is the proper refinement of the primary effect test, for as this Court re-emphasized in *Hunt v. McNair*, supra, 413 U.S. at 743:

> "[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one

aspect of an institution frees it to spend its other resources on religious ends.

This same theme was restated in *Nyquist,* supra, 413 U.S. at 775:

> "* * * Of course it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. * * *"

Viewing the auxiliary services provided under Act 194 against this standard, it can readily be seen that the aid furnished to children under this program has been "carefully restricted to the purely secular side of church affiliated institutions". *Sloan v. Lemon,* 413 U.S. 825, 832 (1973) [3]

Appellants argue, however, that the auxiliary service program is open-ended and hence constitutes a subsidy of the normal operations of nonpublic schools. They

[3] This Court in *Sloan* was also concerned that the tuition reimbursement plan there at issue conferred a special benefit on one class of citizens. Of course, that concern cannot be present here. Act 194 merely provides to nonpublic school students those services which have been provided, for some time, to children in public schools. Hence, insofar as auxiliary services are concerned, all school children are being treated uniformly and no special class or group is being singled out for benefits.

predicate their argument on a utopian portrait of a school system wherein "Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential" (Brief for Appellants at 15). Appellants thus argue that such services are nothing more than a normal part of a school's operating budget. This argument is facially unsound. Appellants are, in effect, saying that there is no such thing as an "auxiliary" service in education. The record simply does not support such a bold assertion, nor does it support the specific assertion that the providing of individual assistance to children requiring services beyond that available in a general instructional program is part of the normal operating costs of a school (Majority Opinion, J S at 30a-35a). The record palpably demonstrates that the providing of such services has not been part of the regular school curriculum of the nonpublic schools. Thus, Dr. D. A. Horowitz, Associate Superintendent for Schools for Special Services of the Philadelphia School District, testified that to the best of his knowledge such services were not a part of the normal school curriculum in the nonpublic schools (App. at A74-A75). Moreover, P. D. Stopper, a speech therapist employed by an intermediate unit to render speech therapy services under Act 194, testified:

> "Q. Now, therefore, you find that there are children who need speech therapy in both public and nonpublic schools?
>
> A. That is correct. I do find, though, that there is a greater need in the nonpublic schools, and the reason I say that is because it's almost like a fron-

tier. There have not been services—well, there have —let's say there have been services, but they haven't been adequate in any way." (App. at A66)

Significantly, the inadequate services to which the witness referred were the limited services provided—not by the nonpublic schools— but by the Intermediate Units prior to the creation of Act 194 (App. at A67).

Appellants, of course, had an opportunity to cross-examine these witnesses. They failed to do so. They had the opportunity to present their own witnesses to justify their assertion that such services were a normal part of the nonpublic school curriculum. They failed to do so. They now ask this Court to accept their assertions as true in the face of a record which demonstrates that their assertions are not true. This Court should refuse to do so.

C. Excessive Entanglement

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court invalidated a state educational program on the ground of excessive entanglement. In *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 734 (1973), this Court sustained educational legislation on the ground that the programs at issue did not constitute excessive entanglement of government with religion.[4] The District Court opinion thoroughly reviewed these decisions and the legislation challenged in each case (J S at 21a-26a). From that review, it concluded that:

[4] *Board of Education v. Allen*, 392 U.S. 236 (1968), antedates this Court's express statement of the excessive entanglement criterion. Yet the *Allen* Court implicitly rejected an attack on that ground. *Id.* at 245.

"* * * a statute authorizing expenditures for education will be held to involve undue entanglement between government and religion if (a) it authorizes the payment of money or the furnishing of materials or facilities to a religious institution, and (b) the purpose of the payment or the nature of the materials or the facilities, and the character of the institution, are such that the government, in order to assure only secular use of the payment, materials or facilities, will be required to be involved in the internal operations of the institution, both religious and secular, on a continuing basis. But a statute authorizing expenditure for education will not be held to involve undue entanglement between government and religion even though it authorizes the payment of money or the furnishing of materials, equipment or facilities to a religious institution, if the expenditure is limited to secular uses and if from the character of the institution, the purpose of the payment and the nature of the materials or facilities we find that it will not be necessary, in order to assure only secular use, for government to be involved in the internal operations of the institution secular and religious, on a continuing basis. * * *" (J S at 26a)

That conclusion contains an excellent synthesis of this Court's decisions under the excessive entanglement standard. On the basis of that conclusion the District Court held that the auxiliary services program did not lead to excessive entanglement.

Appellants argue. however, that the auxiliary services program is so open ended that it would allow the state to furnish teachers for the general instructional pro-

gram of the nonpublic schools. This might be a colorable argument were the appellants arguing in opposition to a motion to dismiss for failure to state a claim for relief. Yet, here appellants have had their day in court, have had the opportunity to support their argument with proof. Appellants offered no evidence which might lead a court to conclude that the Act was susceptible to such an open ended construction. The Guidelines issued by the State Education Department are precise in defining the types of services which may be provided under Act 194 (Exhibit P-1, quoted in Majority Opinion, J S at 29a-30a). On their face, they reveal no intent to go beyond the services authorized under the statute. Moreover, it is necessary to bear in mind that the services authorized by the Act for nonpublic school students have been provided for some time to public school students and those services did not include providing teachers for the general instructional program of the public schools.

Appellants argue that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should control here since "comprehensive, discriminating and continuing state surveillance" (403 U.S. at 619) will be necessary in order to insure that public employes do not inculcate religion. Appellants' reliance on *Lemon* is misplaced. The very essence of the *Lemon* decision was the recognition that the State could not adequately insure that parochial school teachers were not inculcating religion unless the State had a comprehensive system of surveillance which would violate the entanglement principle of the Establishment Clause:

> ". . . The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. . . .
>
> ". . . We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . ." *Id.* at 618.

Act No. 194, on the other hand, is administered by public employees only. Moreover, in the hiring of those public employees, the State is bound by the mandate of Pa. Stat. Ann. tit. 24, Section 1-108:

> "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

The surveillance requirement found necessary in *Lemon* to protect against the deliberate or unintentional inculcation of religion by teachers in the employ of religious schools is obviated entirely by the simple fact that public employees—and only public employees— administer Act 194:

> "The notion that by setting foot inside a sectarian school a professional therapist or counsellor will succumb to sectarianization of his or her professional work is not supported by any evidence." (Majority Opinion, J S at 39a.)

The Intermediate Units are charged with administering Act 194. They are equally charged with providing auxiliary services to public school students. Obviously,

they will exercise the same degree of control over those professionals who serve nonpublic school students as they do over those working with public school students. Hence, "no continuing audit of the nonpublic schools' general instructional program or of their finances is necessary to insure that the services provided remain secular and nonideological" (Majority Opinion, J S at 39a).

The Auxiliary Service Program, on its face and as applied is constitutional under the Establishment Clause.

IV. The Textbook Loan Program Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

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The three judge District Court was unanimous in upholding the constitutionality of the textbook loan provision of Act 195. The reason for this unanimity was, of course, this Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968), which upheld against Establishment Clause attack a New York statute authorizing the loan of textbooks to all children enrolled in public and nonpublic schools.

Appellants here urge this Court to overrule its *Allen* holding. They argue that the loan of textbooks to children in nonpublic schools constitutes state financial support of religious activities or institutions. Their argument is undercut by two obvious facts. First, in virtually every educational expenditure case decided under the Establishment Clause since *Allen*, this Court has reaffirmed the vitality of that decision.[5] Furthermore, this Court has repeatedly stated that state expenditures for education are permissible where care is taken to assure that assistance is "properly confined to the secular functions of sectarian schools." *Norwood v. Harrison*, 413 U.S. 455, 468 (1973). It cannot be said that the loan of textbooks to nonpublic school students "aids religion" as that term has thus far been defined by this Court.

A. The Textbook Loan Program

Act 195 defines textbooks as:

> "* * * books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth." (J S at 114a)

The guidelines promulgated by the Department of Education pursuant to Act 195 provide that each nonpublic

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[5] *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 (1973); *Hunt v. McNair*, 413 U.S. 734, 746-47, n. 8 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 481 (1973). See also, *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970).

school shall submit a loan request for desired textbooks to the Department of Education (Exhibit P-1, §4.3). The Department consolidates loan requests and purchases the textbooks according to Commonwealth purchasing procedures (Exhibit P-1, §4.5). Textbooks are shipped directly from the publishers to the appropriate nonpublic school (Exhibit P-1, §4.6). Since the State retains ownership of the textbooks, the State alone is responsible for "fiscal control, fund accounting and maintaining records for the acquisition of the 'textbooks' " (Exhibit P-1, §4.7). The textbooks loaned to nonpublic schools are to be maintained on an inventory by the nonpublic school and on a Statewide inventory by the Division of School Libraries of the Department of Education (Exhibit P-1, §4.10). To assure that the textbooks requested by the nonpublic schools are in fact being sought at the request of individual students in those schools, the Guidelines further require that the nonpublic schools maintain in their files the "certificates of requests from parents of children for all textbook materials loaned to them under this act." That file must be open for inspection. A letter certifying that such certificates are on file must accompany all loan requests.

B. Primary Effect

The textbook loan program under Act 195 is strikingly akin to the textbook loan program approved by this Court in *Allen*. In enacting Act 195, Pennsylvania recognized that textbooks had been provided to public school children without charge for a long time. By this legislation the State seeks to equalize the availability of these

educational aids to all children in the state.[6] In *Allen*, the statute on its face provided free textbooks to children in all schools. Act 195 authorizes providing textbooks to children in nonpublic schools. But that Act must be considered together with Section 801 of the Public School Code of 1949, Pa. Stat. Ann. tit. 24, §8-801, which has for some time authorized providing textbooks for children in public schools. The two Pennsylvania enactments accomplish the same purpose as the one New York statute.

Thus, it can equally be said of Act 195, when read together with Section 801:

> "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." *Allen*, supra, 392 U.S. at 243-44.

This Court reached this conclusion in light of New York procedures which permitted private schools to submit to boards of education summaries of the requests for textbooks filed by individual students and permitted private schools to store on their premises the textbooks being loaned to the students (392 U.S. at 244, n. 6), since it deemed the paramount and uncontroverted fact to be

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[6] As the legislative finding to Act 195 makes clear, Pennsylvania has for some time directed local school boards to furnish textbooks and educational equipment, supplies and appliances free of charge for use in the public schools of the districts. Public School Code of 1949, Pa. Stat. Ann. tit. 24, §8-801.

that "the books are furnished for the use of individual students and at their request." *Id.*

Significantly the Complaint here does not even allege that religious books are being or will be loaned to nonpublic school students (cf. *Allen*, supra, 392 U.S. at 244). The Act only authorizes the loan of textbooks "which are acceptable for use" in public schools. Since school authorities, by virtue of their offices, must necessarily determine whether a given book is secular or religious when they select textbooks for use in *public* schools, it is impossible to conclude either that they are unable to so distinguish when reviewing requests from nonpublic school students or that they will not honestly discharge their duties under the law. 392 U.S. at 245. As Chief Burger observed in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971):

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable. . . ."

Appellants in their brief have made many of the same arguments which were advanced and rejected in *Allen*. Moreover, their attempts to distinguish *Allen* are of a *de minimis* nature. The *Allen* decision remains vital and Pennsylvania's textbook loan program is well within the scope of permissible state action under that holding.

C. Excessive Entanglement

Appellants argue that the textbook loan program gives rise to "comprehensive, discriminating, continuing state surveillance" and as such inextricably binds up the state in the religious affairs of nonpublic schools. Since

only secular textbooks are loaned and since the Guidelines contemplate only minimum contact between the state and the schools (Exhibit P-1) and since by the very secular nature of the textbooks loaned those contacts will be limited to matters of a nonreligious nature, there is no basis on which to conclude that this program could ever give rise to excessive entanglement by the State in the religious mission of the nonpublic schools.

V. The Instructional Materials Program Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

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The instructional materials provision of Act 195 is so much akin to the textbook loan provision of the Act that, for purposes of analysis, it is more appropriate to discuss those aspects of the program which differ from the textbook program and demonstrate how those differences do not render the program unconstitutional.

A. The Instructional Materials Program

Act 195 provides the following definition of instructional material:

> " 'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes,

> and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, nonideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." (J S at 113a-114a)

The loan of such materials is made to nonpublic schools "on behalf of nonpublic school pupils". The materials loaned must be "useful to the education of such children." Moreover, the materials loaned are limited to those items which "are presently or hereafter provided for public school children of the Commonwealth".

The intermediate units are the responsible agencies for providing such aids to children in nonpublic schools in the areas served by such units (Exhibit P-1, §3.1). Each nonpublic school submits a loan request for the desired instructional materials to the intermediate unit in the area where the nonpublic school is located. The intermediate unit consolidates such requests from all nonpublic schools in its area and orders the equipment for such schools (Exhibit P-1, §3.15). Both the nonpublic school and the local intermediate unit are required to keep an inventory of the instructional equipment and materials loaned (Exhibit P-1, §3.16). Each nonpublic school is required to submit to the local intermediate unit an inventory of all such equipment and materials loaned on or before June 1 of each fiscal year and each intermediate unit is required to submit a composite inventory of such items loaned to all nonpublic schools within its

area to the Secretary of Education by June 30 of each fiscal year (Exhibit P-1, §3.16).

B. Primary Effect

As the District Court concluded, this program differs in only two respects from the textbook loan provision which it unanimously held constitutional: (1) the nature of the materials loaned, and (2) the recipient of the loan (Majority Opinion, J S at 42a). Instructional materials differ in degree but certainly not in kind from textbooks as teaching tools. A textbook of its very nature is suitable for use by an individual student. The materials authorized to be loaned are, of their very nature, suitable for the group use. Yet, the content of both is readily ascertainable. Moreover, the content of the instructional materials is ascertainable in advance, prior to the loan of the materials to the nonpublic schools. Furthermore, only those materials which are acceptable for use in public schools can be loaned under the statute. It can be said of instructional materials, just as this Court said of textbooks in *Allen:*

> *"Absent evidence,* we cannot assume that school authorities, who constantly face the same problem in selecting [instructional materials] for use in public schools, are unable to distinguish between secular and religious [instructional materials] or that they will not honestly discharge their duties under the law." (Emphasis added.) *Allen*, supra, 392 U.S. at 245.

Significantly, appellants make no argument that the materials loaned are religious in nature! They do make

the "recurrent argument" (*Hunt v. McNair*, supra, 413 U.S. at 743), that the program is unconstitutional because assistance provided to the secular aspect of an institution frees it to use its resources in pursuit of religious goals. This Court has invariably rejected that argument. *Allen*, supra; *Hunt v. McNair*, supra.

The recipients of the loan of instructional materials are the nonpublic schools, but this is for the simple reason that the materials themselves are intended for group and not individual use. The materials are for the benefit of the students and are self-policing. The mere presence of secular materials in the nonpublic schools is of no constitutional significance. Moreover, the District Court makes the salient point that this Court's decisions in *Tilton* and *Hunt v. McNair* "teach that the religious institution's *possession* of the property granted under a school aid statute is not alone significant." (Emphasis added.) (Majority Opinion, J S at 45a.) Possession, of course, is constitutionally irrelevant, where, because of the nature of the property loaned, the property cannot be used for religious ends.

C. Excessive Entanglement

Appellants argue that the loaning of instructional materials will require undue and excessive involvement by the state in religious matters in order for the State to assure that those materials are used only for non-religious purposes. They suggest that maps and globes could be used "in connection with a recruitment campaign for religious vocations and missionary work" (Brief

for Appellants at 27). Putting to one side the limited utility of such a means for such an end, and assuming that appellants are genuinely concerned about such an occurrence, the question remains whether this Court's opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), compels the conclusion suggested by appellants.

Lemon v. Kurtzman dealt with a state aid program whereby the state subsidized teachers who taught certain secular courses in nonpublic schools. This Court found the program unconstitutional because the required State supervision necessary to insure that the teachers remained religiously neutral in teaching secular courses gave rise to "comprehensive, discriminating and continuing state surveillance", *Id.* at 619. This Court in *Lemon* was concerned about the unconscious and unintentional manner by which a parochial school teacher, acting in good faith, might inculcate religion in the teaching of a secular course. This Court was not concerned—and on the record before it, just as on the record in this case, could have no basis for concern—that nonpublic school teachers would act in bad faith or with a "conscious design to evade the limitations imposed by the statute and the First Amendment." *Id.* at 618. Yet, in the above example, this is just what appellants are suggesting—conscious and deliberate use of materials for other than their intended purpose. Absent proof of such bad faith (and there is none in this record; see, for example, App. at A92), appellants' argument must fail.

VI. The Instructional Equipment Program Meets the Primary Effect and Excessive Entanglement Tests Under the Establishment Clause

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The District Court, in reviewing Act 195's instructional equipment program, concluded that the definition of the types of equipment which could be loaned was overly broad in that some of the equipment loaned could be easily divertible to a religious purpose. The Court directed the State to prepare a new guideline which would limit the definition of instructional equipment to only those types of equipment which could not readily be divertible to a religious purpose. The State has done so and that guideline is appended to appellants' brief (Brief for Appellants at 33-34). The administration of the program is identical to the administration of the instructional materials program (see supra, V, A).

A. Primary Effect

Appellants argue that loaning the limited types of equipment now authorized under the new guideline is no different than granting monies to nonpublic schools for paying for heating fuel in such schools. They rely on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, this Court invalidated New York's "maintenance and repair" statute which authorized grants totaling $30 to $40 per pupil directly to sectarian schools with no effective restriction on the *use* to which the maintenance and repair funds could be put. As Justice Powell noted, "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes . . ." *Id.* at 774. The touchstone of the Court's analysis was the lack of restrictions on use. Here, the restrictions on use are innate. The equipment which can be loaned is self-policing. It cannot be used for other than its intended purpose. The purpose is purely secular, as even a most cursory review of the amended guideline will reveal. Since the aid, then, is clearly "identifiable and separable from aid to sectarian activities" (*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 480 (1973)), the primary effect of the instructional equipment program cannot be said to advance religion.

B. Excessive Entanglement

Appellants argue that State surveillance will, nevertheless, be necessary to assure that the shop classes of the nonpublic schools are not using industrial arts equipment to build crosses and altars. They argue, moreover, that such surveillance will be necessary to be sure that a storage cabinet "furnished as a recommended accessory to a permissible item under this guideline" (Amended Guideline, Brief for Appellant at 34) will not be used to store religious materials. This is truly "giving free rein to the imagination" (Majority Opinion, J S at 46a). Appellants say these things could be accomplished with "moderate resourcefulness" (Brief for Appellants, p. 29). Moderate resourcefulness, indeed! They are suggesting manifest bad faith on the part of teachers in nonpublic schools. As this Court made clear in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971):

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

Appellants failed to produce any evidence that the purpose of the Act had been subverted in the way they suggest. Absent evidence, this Court should be loath to invalidate important educational legislation on the basis of appellants' unsupported conjectures.

VII. Acts 194 and 195 Do Not Generate the Possibility of Political Divisiveness Along Religious Lines

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Appellants have argued that Acts 194 and 195 give rise to political divisiveness along religious lines. As a matter of proof, appellants have introduced no evidence to support their claim. As a matter of law, this Court has taken the view that the possibility of such divisiveness is a cumulative factor to be weighed in the constitutional balance. Standing alone, the mere possibility of such divisiveness is insufficient to invalidate otherwise constitutional State action. This Court recently noted that the "prospect of such divisiveness may not alone warrant the invalidation of State laws that otherwise survive the careful scrutiny required by the decisions of this Court." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 797-98 (1973).

Since the District Court concluded that the instant legislation was constitutional, under all of the standards announced by this Court, it was loath to conclude, as a matter of law, that the possibility of such divisiveness was present here, or, for that matter, that its decision, whether upholding or invalidating this legislation, would in some way render the underlying issue less divisive.

Since the legislation here challenged is constitutional under this Court's tripartite test, appellants' divisiveness argument, standing alone, offers no basis on which to nullify this legislation.

VIII. Appellants Have Failed To Prove That Acts 194 and 195 Violate the Establishment Clause

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Throughout this brief, great emphasis has been placed on appellants' singular failure to come forward with proof to support their conclusory allegations. It is most appropriate that due emphasis be given to this matter. At issue here are two legislative enactments of the Commonwealth of Pennsylvania. Cases arising under the Establishment Clause warrant no different approach than other cases challenging the constitutionality of state statutes: it is the plaintiff's burden to establish unconstitutionality and not the State's burden to prove constitutionality. This Court itself has stressed this important fact in *Allen* and *Hunt v. McNair*. Appellants would have this Court assume that many nonpublic schools in the State are "pervasively sectarian" (*Hunt v. McNair*, supra, 413 U.S. at 743). Yet appellants have failed to introduce a scintilla of evidence on this score.

In paragraph 8 of their complaint, appellants attempted to characterize the nonpublic schools in which students would receive the benefits provided by Acts 194 and 195 (App. at A6-A7). Defendants specifically denied that characterization (App. at A27, A30). At the evidentiary hearing held in this case, appellants' counsel asked a series of hypothetical questions of the Coordinator of Nonpublic School Services in an attempt to determine whether the State makes any inquiry as to the degree of religiosity of the nonpublic schools. The witnesses stated that the state makes no such inquiry and, in fact, as to one of appellants' questions, stated that he did not know of any schools that impose religious restrictions on admissions (App. at A48). Judge Gibbons correctly summarized the testimony on this point:

> "He has testified that he makes no such inquiry with respect to each of the areas of inquiry Mr. Pfeffer asked about. That's his only testimony so far." (App. at A50)

Yet from this, appellants have argued in their jurisdictional statement (J S at 5) and in their brief (Brief for Appellants, at 4, 18) that appellees "concede" that schools possessing the ten religious characteristics enumerated in paragraph 8 of their complaint (App., pp. A6-A7) are eligible for benefits under Acts 194 and 195). That argument is untrue and unsound, for it assumes as a fact something which appellants had the full opportunity to *prove* as a fact but something they completely failed to establish—that schools possessing those characteristics do, in fact, exist. Appellees, in their pleading denied this characterization of the schools. It was, then, appellants'

burden to prove that such schools do exist, and this they completely failed to do. The only witness they produced frankly admitted that he did not know whether such schools exist (App. p. A48). Appellants in their brief to this Court make their arguments as though this matter were on appeal from the granting of a motion to dismiss, where all the allegations of their complaint must be taken as true. In this, they err egregiously. In the first place, a record has been established in this case. Appellants had a full opportunity in the creation of this record, to attempt to prove those matters which they blithely request this Court to assume as true. Thus, it can be said of appellants just as it was said in *Hunt v. McNair,* supra, 413 U.S. at 743:

> "Appellant has introduced no evidence in the present case placing the [nonpublic schools] in such a category."

The same failure of proof was present in *Tilton v. Richardson,* 403 U.S. 672, 682, wherein this Court refused to invalidate important educational legislation "on the basis of a hypothetical 'profile' " of the various participating schools.

Just as this Court has required more from the State than a "mere statistical judgment" (*Committee for Public Education and Religious Liberty v. Nyquist,* supra, 413 U.S. at 778), to assure that State funds will not be used to finance religious education, so too must this Court require more of those who would challenge State action than an unproven characterization of the nonpublic schools of Pennsylvania.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment below.

Respectfully submitted,
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